IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1674

KINGS COUNTY; CHARLES GARDNER, Planning Director and Chairman of the Planning Commission of Kings County; and KINGS COUNTY PLANNING COMMISSION,

Petitioners,

vs.

SANTA ROSA BAND OF INDIANS; MARK BARRIOS; and PETE BAGA,

Respondents.

Brief of the County of Riverside, State of California, as Amicus Curiae in Support of the Petition for a Writ of Certiorari.

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The County of Riverside, a political subdivision of the State of California, hereby files this Brief as Amicus Curiae pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

Interest of Amicus Curiae.

The County of Riverside is a general law county located in the southern part of the State of California. Organized in 1893, the County encompasses 7,200 square miles within its political boundaries. Included within the County are 11 Indian Reservations with

a total area in excess of 104,000 acres: Agua Caliente, Augustine, Cabazon, Cahuilla, Morongo, Pechanga, Ramona, Santa Rosa, Saboba, Torres-Martinez, and Colorado River. Not all of the land included within the boundaries of the reservations is contiguous; 6 reservations are composed of alternate sections of land arranged in an "impractical pattern of checkerboard jurisdiction" condemned by this Court in *Seymour v. Superintendent,* 368 U.S. 351, 358 n.16 (1962).

Today, a total of approximately 900 Indians and non-Indians reside on the reservations located within Riverside County. County roads serve each reservation, and children on the reservations attend local schools. With the exception of the small portion of the Colorado River Indian Reservation located in California, none of Indian bands occupying the Indian Reservations in Riverside County perform full law and order functions, relying instead on city and county officials. Several reservations are adjacent to or partially within, city boundaries. [38 F.R. 13758 (May 25, 1973).]

The County of Riverside in recent years has been involved in litigation in both the State and Federal courts concerning the scope of jurisdiction given State political subdivisions by P.L. 280 [28 U.S.C. §1360, 18 U.S.C. §1162]. *Ricci v. County of Riverside,* 71-1134-EC (C.D. Calif. Sept. 9, 1971), *dismissed as mot,* 495 F.2d 1 (9th Cir. 1974) [enforcement of county building code]; *Madrigal v. County of Riverside,* 70-1893-EC (C.D. Calif. Feb. 16, 1971), *aff'd*

on other grounds, 495 F.2d 1 (9th Cir. 1974) [enforcement of county rock festival ordinance]; *Imperial Sign Co. v. Municipal Court, Desert Judicial Dist.,* Indio No. 12425, Riv. Sup. Crt., Jan. 29, 1970 [enforcement of billboard restrictions against non-Indian lessee of trust land].

The judgment below adversely affects the administration of State and County programs, and law enforcement in Indian country within the County of Riverside by giving P.L. 280 a cramped and strained construction. For the reasons explained herein, the County of Riverside submits this brief, *amicus curiae,* for the purpose of urging the Court to grant the Petition for Certiorari and to reverse the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT.

The Decision Below Conflicts With Decisions of the Same Circuit, Other Circuits, and of This Court.

The court below holds that P.L. 280 [28 U.S.C. §1360, 18 U.S.C. §1162] does not grant jurisdiction to the enumerated States to enforce the provisions of County zoning ordinances or building codes against Indians within Indian country. The court's opinion in this regard, rests on two conclusions:

1. County ordinances are not "civil laws of [the] State . . . that are of general application . . . within the State . . ." and therefore are not encompassed within the jurisdictional grant of P.L. 280.

2. County ordinances are "encumbrances" excluded from application in Indian country by 25 C.F.R. §1.4 and 28 U.S.C. §1360(b).

1. The Lower Court Has Misconstrued the Words "State Law" in P.L. 280.

The court below found the phrase "State Statute" used in P.L. 280 to be ambiguous[1] and subject to two interpretations: the phrase makes applicable to Indian reservations only those civil laws passed by the State Legislature which are of statewide application; or the phrase makes applicable to Indian reservations those civil laws which apply equally to Indians and non-Indians. [Slip Opinion p. 7, lines 11-16.]

The court resolved the ambiguity it found by choosing the first alternative. In so doing the court rejects the

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[1]In *Anderson v. Gladden,* 293 F.2d 463 (9th Cir. 1961), *cert. denied* 368 U.S. 949 (1961), a different panel of the same Circuit characterized the terms of P.L. 280 as "unambiguous."

suggestion that the legislative history indicates that Congress contemplated the application of the "full panoply of state, county and municipal ordinances faced by other citizens." The court was also aided in reaching its conclusion by what the court characterizes as a "principle" of construction and by the concept of "tribal self-rule".

In construing the phrase "State Statute" in 28 U.S.C. §1360(a) and 18 U.S.C. §1162(a) to include only those civil laws passed by the State Legislature which are of statewide application, the court has made an illogical and impractical distinction as to which State laws apply in Indian country, based upon the method of law's promulgation, and has ignored expressions of Congressional intent inconsistent with the court's construction.

The distinction made by the court between "State" and "local" laws ignores the relationship between the States and their political subdivisions and assumes a clear boundary exists between a "State" law and a "local" law. The boundary chosen by the court is the enacting authority.[2]

In making the distinction between "State" and "local" laws depend upon the territorial jurisdiction of the enacting authority, the court has rendered inapplicable to Indian country those laws that, although they embody a policy of statewide concern, rely in whole or in part upon legislative implementation by political agencies and subdivisions of the State.[3]

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[2]This distinction fails to recognize the part court decisions play in "making" State laws. *Sessions Inc. v. Morton,* 348 F.Supp. 694, 700-701 (1972), *aff'd,* 491 F.2d 854 (9th Cir., 1974).

[3]This Court in construing the phrase "State Statute" used in 28 U.S.C. §2281 defining the jurisdiction of a three-judge

(This footnote is continued on next page)

Rendered unenforceable in Indian country are those provisions of the State Constitution and those enactments of the State Legislature that create and empower cites and counties and other State agencies to exercise legislative powers. *Cf., Palm Springs Spa v. County of Riverside,* 18 Cal.App.3d 372, 376, 95 Cal.Rptr. 879 (1971), holding California Indian reservations to be "geographically, politically, and governmentally within the boundaries of the State."

The opinion also denies to the State Legislature the ability to implement paramount State policies in Indian country by authorizing or requiring cities, counties, special districts and State officers or agencies to adopt local regulations, *e.g.,* prevention of forest fires, Cal. Pub. Res. Code §§4117, 4251-4257; control of air pollution, Cal. Health and Safety Code §§40100-40126, 40150-40161, 40200-40276, 40300-40392; coastal zoning, Cal. Pub. Res. Code §§27320, 27400; flood plain regulation, Cal. Water Code §§8410, 8411; environmental quality, Cal. Pub. Res. Code §§21001 (f), 21092; solid waste management, Cal. Govt. Code §§66730, 66732 [compare, *Snohomish County v. Seattle Disposal Co.,* 70 Wash.2d 668, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016 (1967)]; airport hazard zoning, Cal. Govt. Code §§50485-50485.14, 21661.5, 21670, 21675; water quality control, Cal. Water Code §§13222, 13225, 13243; control of waste discharge from houseboats, Cal. Water Code §§13904-13906; construction in beds of mapped highways, Cal. Streets and Highways Code §§740.4-741.2; regulation of outdoor advertising, Cal. Bus. and Prof. Code §§5230, 5320.

court, rejected a definition that depended upon the method of adoption of the statute, *American Federation of Labor v. Watson,* 327 U.S. 582, 592-593 (1946).

Indeed, Counties would appear to lack the ability to exercise the authority given them under State Statute to regulate vehicle speed and use of County roads in Indian country. Cal. Vehicle Code §§21100, 21102, 22357, 22358. *Ortiz-Barraza v. U.S.,* 512 F.2d 1176, 1180 (9th Cir. 1975).

Both the Kings County ordinances held by the court to be inapplicable to Indian country implement policies of the State Legislature.

Kings County is required by enactments of the State Legislature to adopt a building code and the substantive requirements of the code are closely prescribed by the Legislature. *Green v. Superior Court,* 10 Cal.3d 616, 627, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974); Cal. Health and Safety Code §§17922, 17950, 17958; see also 55 Ops. Cal. Atty. Gen. 157 (1972).

Similarly, the Kings County zoning ordinance is a response to a mandate of the State Legislature. Cal. Govt. Code §§65300-65303, 65563, 65910, 65800 and 65860.

The court not only strikes down the application of "local regulations" to Indian country, but also holds that P.L. 280 is the exclusive source of the State's governmental jurisdiction over Indian country:[4]

> . . . We have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the

[4]The statement by the court is overbroad, unless the court is "overruling" *Langford v. Monteith,* 102 U.S. 145 (1880); *United States v. McBratney,* 104 U.S. 621 (1882); *Draper v. United States,* 164 U.S. 240; *Thomas v. Gay,* 169 U.S. 264 (1898); *Surplus Trading Co. v. Cook,* 281 U.S. 647, 651 (1930); *United States v. McGowan,* 302 U.S. 535, 539 (1938); *Organized Village of Kake v. Egan,* 369 U.S. 60, 71-75 (1962).

reservation provided, except as Congress chose to grant that power, *McClanahan, supra,* at 175. Indeed, P.L. 280, by defining the limits of the jurisdiction granted "P.L. 280 states" such as California, necessarily pre-empts and reserves to the Federal Government or the tribe jurisdiction not so granted. [Citation.] [Footnote omitted. Slip Opinion p. 4, line 21, to p. 5, line 3.]

By holding that political subdivisions of a P.L. 280 State need a Congressional grant of authority in order to acquire civil and criminal jurisdiction,[5] the court may have deprived all Indian country in California of access to the State's municipal and justice courts. The territorial jurisdiction of these courts is defined by County ordinance. Cal. Govt. Code §71040. See *Kennerly v. District Court,* 440 U.S. 423 (1971).

The result of the court's opinion is that California Indians residing in Indian country, in addition to being outside County legislative power, are not subject to the enactments of the State Legislature relying on city, county or administrative agency implementation and that apply to non-Indian citizens elsewhere within the State. This construction of P.L. 280 is not shared by the Eighth Circuit which in *Kills Crow v. United States,* 451 F.2d 323 (8th Cir. 1971), *cert. denied,* 405 U.S. 99 (1972), characterized P.L. 280 as follows:

> Significant limitations of an alternative to wardship already have been provided. Thus criminal and civil jurisdiction over Indians living on reservations in several states has been given up by the federal government, and the laws of those states now apply generally to Indians as to all other state citizens. See, e.g., 18 U.S.C. §1162; 28 U.S.C. §1360. . . . [451 F.2d at 326 n.4.]

[5]There is no existing authority whereby political subdivisions of a state could acquire jurisdiction over Indian country, even with the consent of the affected Indians. Existing legislation providing for acquisition of civil and criminal jurisdiction applies only to "States." 25 U.S.C. §1322.

The opinion is also inconsistent with the statement made by the Supreme Court in *Organized Village of Kake v. Egan,* 369 U.S. 60, 74 (1962), that P.L. 280 granted the enumerated States "full civil and criminal jurisdiction over Indian reservations."

a. *Legislative History.*

In support of its conclusion that Congress did not intend "local" ordinances to apply in Indian country, the opinion states that there is "nothing specific in the legislative history shedding any light on whether or not Congress intended to subject reservation trust lands to local civil or criminal ordinances." [Slip Opinion p. 9, lines 18-21.] This is not correct.

The opinion rejects as applicable the broad purposes statement made in the House and Senate reports on P.L. 280:

> . . . The broad language in the legislative history relied on by the County announces the congressional objectives of the entire termination process, but was not meant to describe the interim status of Indians or trust lands before completion of the process. [Slip Opinion p. 12, lines 7-11.]

Another panel of the same Circuit reached a different conclusion in *Capitan Grande Band of Mission Indians v. Helix Irrigation District,* 514 F.2d 465 (9th Cir. 1975;, *cert. denied,* 44 U.S.L. Week. 3205 (U.S. Oct. 6, 1975):

An examination of the legislative history of P.L. 280 indicates that the measure had two coordinate aims: "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." H.R. Rep. No. 848, 83d Cong., 1st Sess. 3 (1953), adopted in S.Rep. No. 699, 83d Cong., 1st Sess. 3 (1953), 2 U.S. Code Cong. & Admin. News 2409 (1953). The report also stated that:

> [T]he Indians of several states have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States *insofar as those laws are of general application to promote persons or private property,* is deemed desirable. H.R. Rep. No. 848 at 6, S.Rep. No. 699 at 5, 2 U.S. Code Cong. & Admin. News 1953, at p. 2412 (emphasis added).

The emphasis upon laws "of general application to private persons or private property" is significant. While by the terms of P.L. 280 Congress, *inter alia,* may have "intended to grant to the state the full exercise of police power," and thus the ability to enforce, e.g., zoning ordinances or gambling ordinances, and to apply its statutes of limitations to ordinary commercial transactions "between Indians or to which Indians are parties," it is not at all clear that Congress meant for

> a state statute of limitations to apply in a lawsuit initiated by an Indian band against a third party for damages to its property interests held in trust by the United States for the benefit of the land. . . . [Footnotes omitted. 514 F.2d at 467-468.]

The Eighth Circuit is also in accord with the above-quoted statements from the *Capitan Grande* case. *Omaha Tribe of Indians v. Peters,* 516 F.2d 133, 137 (8th Cir. 1975).

The legislative history of P.L. 280 discloses that "local authorities" were consulted by the Bureau of Indian Affairs prior to congressional action on P.L. 280. Such consultation would have been unnecessary under the court's construction of "State Statute". 1953 U.S. Code Cong. and Adm. News 2413-2414; *Rincon Band of Mission Indians v. County of San Diego,* 324 F.Supp. 371, 374-375 (S.D. Cal. 1971); *rev. on other gds.,* 495 F.2d 1 (9th Cir. 1974).

Companion legislation to P.L. 280, Section 2 of the Act of August 15, 1953, c. 502, 67 Stat. 586 (19 U.S.C. §1161), eliminating discriminatory Indian liquor laws also contains a reference to "State" laws. The legislative history of the Act clearly indicates that "local" municipalities were included within the jurisdictional grant therein contained, 1953 U.S. Code Cong. and Adm. News 2399-2400.

The year following enactment of P.L. 280, the Special Subcommittee on Indian Affairs to the House Committee on Interior and Insular Affairs discussed P.L. 280 as follows:

> Law and order functions of the Indian Bureau can and should be entirely transferred to the States. Public Law 280 of the 83d Congress operated to (1) confer as of enactment date, civil and criminal

jurisdiction in California, Minnesota (except Red Lake), all of Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee); . . . [H.R. Rep. No. 2680, 83d Cong., 2d Sess. 5 (1954).]

Finally there is Section 9 of the Act of November 2, 1966, Pub. L. 89-715, 80 Stat. 1112 (25 U.S.C. §416h). This section authorized certain Indian tribes in a non-P.L. 280 State to enact for their respective reservations "zoning, building, and sanitary regulations . . . in the absence of state civil and criminal jurisdiction. . . ." The legislative history of the Act indicates that Congress assumed that the special authorization to the Indian tribes to adopt land use controls would be unnecessary once P.L. 280 was adopted. The legislative history also indicates, contrary to the opinion of the lower court that zoning and building controls would be a burden and have a "devastating impact" on economic development of Indian reservations, that Congress found such controls to be an imperative to economic development!

> MR. HALEY: . . . I certainly concur with the expression of opinion that the State of Arizona should take affirmative action as authorized under Public Law 280, of the 83d Congress. I hope the State will do this promptly.
>
> However, it should be pointed out that the State of Arizona could have assumed this jurisdiction any time within the last 13 years. I have no way of knowing, and I presume the gentleman has no way of knowing as to when, if ever, the State of Arizona intends to assume such jurisdiction.

> These Indian lands are ripe for development. In at least one reservation, there are allotted lands which could be disposed of now, without any plan, and without any regulation by the laws of zoning, sanitation or construction of any jurisdiction. There are plans afoot, particularly in the Salt River Pima-Maricopa Reservation for planned development of the whole reservation, including the allotted lands, I can well imagine that this plan might fall apart unless it is implemented with a reasonable period of time.
>
> Certainly, the Secretary of the Interior should give the State of Arizona reasonable time to allow it to assume the jurisdiction contemplated by Public Law 208 [*sic*, should be 280]. However, it is certainly not my intention that development of these reservations must await forever—this type of action by the legislature of Arizona. We have no way of knowing whether the legislature will ever act or not. It would certainly be manifestly unfair to make the Indians wait for an indeterminate period of time to develop their lands, pending the resolution of a situation which they have no possibility of control. [112 Cong. Rec. 27000 (1966).]

In support of its construction of P.L. 280, the lower court finds a consistency between its holding and the "present" Indian policy of Congress. The sources cited for divining the "present" policy of Congress are not the amendment or repeal of P.L. 280 or similar legislation enacted in 1948, 1950 and 1968[6] by Congress,

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[6]Act of July 2, 1948, c. 809, 62 Stat. 1224 (25 U.S.C. §232); Act of September 13, 1950, c. 845, 64 Stat. 845 (25 U.S.C. §233); 1968 Civil Rights Act, Act of April 11, 1968 (Pub. L. 90-284), 82 Stat. 78-79 (25 U.S.C. §§1321, 1322).

but a text, several law review artieles and the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.* [Slip Opinion, p. 13, line 21, to p. 14, line 13.] This is hardly an example of an "unmistakable directive" that this Court looks for, before it construes an act of Congress in a manner that runs counter to the broad goals which Congress intended it to effectuate. *Federal Trade Commission v. Meyer,* 390 U.S. 341, 349 (1968).

In *Menominee Tribe v. United States,* 391 U.S. 404 (1968), P.L. 280 and the Menominee Termination Act were construed in accordance with the "overall legislative plan" of Congress at the time the two Acts were approved by Congress, not according to the Court's notion of the policy of Congress in 1968.

b. *"Principle" of Construction.*

In resolving the ambiguity the court finds in the phrases "State Statute" and "encumbrance" used in P.L. 280, the opinion relies upon a canon of construction stated by the court as follows:

> . . . that ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians. [Slip Opinion, p. 7, lines 19-21.]

This rule is characterized by the court as a "principle . . . somewhat more than a canon of construction. . . ." This "principle" the court cites as general authority for it to construe Acts of Congress in a manner consistent with the Court's conception of what is favorable to the Indians upon the mere conclusion by the court that the statute is in part "ambiguous."

> . . . While there is legally nothing to prevent Congress from disregarding its trust obligations

> and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in a manner most consistent with the nation's trust obligations. . . . [Slip Opinion p. 8, lines 9-15.]

Opinions by the Supreme Court disagree with the lower court's application and definition of the canon. Recently, the Supreme Court in *Antoine v. Washington,* 420 U.S. 194 (1975), stated the canon as follows:

> The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. [Citations omitted.] In *Choate v. Trapp, supra,* also a case involving a ratifying statute, the Court stated, "[t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U.S., *supra,* at 675. . . . [420 U.S. at 199-200.]

P.L. 280 is not a statute ratifying an agreement with the Indians or one passed for the benefit of Indians, but one defining Federal-State relations. *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648, 653 (9th Cir. 1966), *cert. denied,* 387 U.S. 907 (1967). According to *United States v. First National Bank,* 234 U.S. 245, 259 (1914), the canon of construction is not applicable where the statute is not

in the nature of a contract and does not require the consent of the Indians to make it effectual. See also *Capoeman v. United States,* 440 F.2d 1002 at 1008 (Ct. Cl., 1971).

But even assuming that the canon of construction could properly be applied to interpret P.L. 280, its sole function, as with all canons of construction, is to discover Congressional intent. *United States v. Rice,* 327 U.S. 742, 753 (1946). It is not authority for the courts to overcome the plain meaning of acts of Congress in following a policy the courts believe preferable to that determined by Congress. As stated in *United States v. Choctow Nation,* 179 U.S. 494 (1900):

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its views as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government. . . . [179 U.S. at 532.]

This rule has been adhered to even where the effect of legislation was to the severe detriment of the Indian. *United States v. First National Bank,* 234 U.S. 245 (1914).

c. *"Tribal Self-Rule."*

"Tribal self-rule" is also cited as a justification for the court's holding. In so doing, the court adheres to the *Worchester v. Georgia* "platonic" notion of Indian sovereignty as an independent source of authority to strike down "interfering" State legislation. See *Williams v. Lee,* 358 U.S. 217 (1959). This rationale was disapproved in *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973):

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. See *Mescalero Apache Tribe v. Jones,* 411 U.S. 145. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., *United States v. Kagama,* 118 U.S. 375 (1886), with *Kennerly v. District Court,* 440 U.S. 423 (1971). [Footnotes omitted. 411 U.S. at 172.]

The Supreme Court in a footnote later in the opinion further reinforced its disapproval of the "interference" test of *Williams.* 411 U.S. at 180 n.21.

The lower court approaches the construction of P.L. 280 with a fixed opinion as to the scope of tribal self-rule, instead of viewing the scope of tribal self-rule as a by-product of defining the limits of state power vis-a-vis federal control.

It is pure fiction to attribute an intent to Congress to "distribute" jurisdiction in such a manner as to make "tribal government over the reservation more

or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction." [Slip Opinion p. 12, line 25, to p. 13, line 3.]

P.L. 280 was enacted because tribal government in many States had broken down, and this appears in the legislative history to P.L. 280:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.
>
> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable. [1953 U.S. Code Cong. and Adm. News 2411-2412.]

Those Indian tribes in P.L. 280 States with a functioning tribal government and not consenting to State jurisdiction, were excluded from the operation of P.L. 280. 1953 U.S. Code Cong. and Adm. News 2412.

The absence or breakdown of tribal government in California that made necessary the enactment of P.L. 280 was brought out in pre-enactment congressional hearings. See, Hearings on H.R. 459, H.R. 3225, H.R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Session, ser. 11 (1952) at 78; see also, *People v. Bray*, 105 Cal. 344, 347, 38 Pac. 731 (1894).

2. The Court Has Misconstrued the Word "Encumbrance" in P.L. 280 and 25 C.F.R. §1.4.

The second alternative ground cited by the court for its decision is that the Kings County zoning ordinance and building code are regulations of the use of trust lands inconsistent with 25 C.F.R. §1.4, and that the ordinance and code are prohibited "encumbrances" on Indian land within the limitations of 28 U.S.C. §1360(b).

a. *25 C.F.R. §1.4.*

In holding 25 C.F.R. §1.4 applicable to this case, the court ignores the plain language of the regulation, and the absence of specific Congressional authorization for the regulation.

By its own terms, and the intent expressed by the Secretary of Interior in promulgating 25 C.F.R. §1.4, the regulation was to apply only to *leased* Indian trust property. The lower court does not explain or justify the extension of this regulation to the facts of this case. The Secretary stated:

> The purpose of this addition is twofold. First, it will enunciate and particularize in regulatory form for the benefit and guidance of those con-

> cerned the sense of existing law under which laws, ordinances, codes, resolutions, rules or other regulations of a State or its political subdivisions limiting, zoning, or otherwise governing, regulating or controlling the use or development of property are inapplicable to trust or restricted Indian property held or used under a lease or other agreements. . . . [30 Fed. Reg. 6438 (May 7, 1965)].

The above quote also demonstrates that the Secretary of Interior was adopting an "interpretative" regulation and not a "legislative" regulation. The difference between the two types of regulations is summarized in the Final Report of the Attorney General's Committee on Administrative Procedure (1941):

> Administrative rule-making in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids . . . [Id. at 100.]

An "interpretative" regulation is merely a reflection of the authority it interprets and cannot extend or reduce the scope of the act of Congress it interprets. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954). As an "interpretative" regulation, 25 C.F.R. §1.4 adds nothing to the meaning of the word "encumbrance" used in 28 U.S.C. §1360(b).

The lower court treats 25 C.F.R. §1.4 as a "legislative" type regulation. The Secretary of Interior lacks general regulatory powers over Indian affairs and must be specifically authorized by Congress to adopt "legislative" regulations. *Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962); *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962). The specific congressional authority cited by the court to support the regulation is 25 U.S.C. §465, which authorizes the Secretary to purchase land and hold it in trust for the "purpose of providing land for Indians." This section, however, does not authorize the Secretary to regulate the use of the lands purchased by the Secretary and such authorization would appear to be necessary under the *Metlakatla* case in order to treat 25 C.F.R. §1.4 as a "legislative" type regulation.

In the *Metlakatla* case, the Court, in interpreting Public Law 280, held that an Alaska law prohibiting fish-traps would not be enforceable on the Metlakatla reservation where it is inconsistent with a regulation of the Secretary of the Interior authorizing their use. Authority for the Secretary to regulate the land use on the reservation was found in the act establishing the reservation (48 U.S.C. §358): the land is "to be held and used by them [the tribe] in common, under such rules and regulations, subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." There is no similar act of Congress specifically authorizing the Secretary of the Interior to regulate land use on the Santa Rosa Rancheria. To the extent then, that 25 C.F.R. §1.4 is inconsistent with P.L. 280, it cannot prevail and is void in the same manner as the Secretary's fish-trap regulation was, outside the Metlakatla reservation. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962).

b. *"Encumbrance."*

The use of the word "encumbrance" in 28 U.S.C. §1360(b) the court finds ambiguous and relying upon its announced "principle" of construction, concludes that the word "may reasonably be interpreted to deny the state the power to apply zoning regulations to trust property." [Slip Opinion p. 23, lines 10-11.] The lower court notes in a different context, the regulation of the Secretary adopting and making applicable State zoning ordinances [30 Fed.Reg. 8722 (July 9, 1965)] but does not follow through with the implication that flows from its construction of "encumbrance" and strike these regulations down along with 25 C.F.R. §1.4(b). In fact, the court reiterates its validation of 25 C.F.R. §1.4.

Not only is the lower court's interpretation of "encumbrance" in 28 U.S.C. §1360(b) inconsistent with the authority retained by the Secretary of Interior in 25 C.F.R. §1.4(b), but renders 28 U.S.C. §1360(b) internally redundant, is inconsistent with a related but subsequent act of Congress, and in conflict with the interpretation placed on the word in one of the acts of Congress creating and defining the trust states of Indian land.

Section 1360(b) of Title 28, United States Code provides in part:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, . . .; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; . . .

If the court is correct in its construction that a regulation of the use of Indian trust land is an "encumbrance", then the second clause of 28 U.S.C. §1360(b) is redundant to the first clause.[7] What is more likely, is that Congress did not regard a zoning ordinance or a building code as an "encumbrance" on Indian land.

In 1966, Congress authorized certain Indian communities in Arizona to enact zoning, building, and sanitary regulations in the absence of the State assuming P.L. 280 jurisdiction. Act of November 2, 1966, Pub. L. 89-715, 80 Stat. 1112, §9 (25 U.S.C. §416h). Another section of the same Act, states that:

> Nothing contained in this Act shall—(a)uthorize the alienation, encumbrance, or taxation of any interest in real or personal property, . . . [Act of November 2, 1966, Pub. L. 89-715, 80 Stat. 1112, §10 (25 U.S.C. §416i).]

If Congress considered zoning ordinances and building codes to be "encumbrances" then it authorized the enactment of "encumbrances" in Section 9 of the Act while disclaiming the intent to do so in Section 10.

The words "alienation, encumbrance, or taxation", are not unique to P.L. 280. Similar terms have been

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[7]The opinion in footnote 20 attempts to avoid the internal redundancy caused by its construction by interpreting "encumbrance" to preclude "all regulation or restrictions attached directly to land use" and the second clause of 28 U.S.C. §1360(b) and 18 U.S.C. §1162(b) as encompassing "all activity located on reservation land, permitting comprehensive state regulation except where preempted by or inconsistent with overriding Federal enactments." But, by equating the statutory language, "use of such property", with "all activity located on reservation land" the court, under the second clause, acknowledges the power of the State legislature to regulate the activity, manner, purpose, or object to which persons employ or utilize property in Indian country (absent overriding Federal enactments), while interpreting the first clause as preventing such regulation.

employed by Congress in other acts in connection with Indian trust property, *e.g.*, General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388. The use of the same words in various acts in connection with Indian property indicates that the words enjoy the same meaning. This connection was made by another panel of the Ninth Circuit in *Kirkwood v. Arenas,* 243 F.2d 863 (9th Cir. 1957):

> The District Court held that when Congress enacted legislation ceding limited state jurisdiction over civil and criminal actions in Indian lands of California, and in such legislation declared that:
>
> "Nothing . . . [herein] shall authorize the alienation, encumbrance, or taxation or any real or personal property . . . belonging to any Indian . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States . . ." 67 Stat. 588, 589, Act of August 15, 1953, 28 U.S.C. §1360(b), 18 U.S.C. §1162(b).

it intended to exempt such Indians' land from direct taxation. We doubt the validity of such construction. *Rather, we think the quoted part of the Act merely negatives the idea that any change in the law as to "alienation, encumbrance, or taxation", of Indians' property was intended.* The quoted part of the Act, however, is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment, . . . The legislative history of the provision supports the view we here express. See Legislative History of Title 28, U.S.C. §1360, Act of Aug. 15, 1953, U.S. Code, Congressional and Administrative News, Vol. 2, p. 2409. . . . [Emphasis added. 243 F.2d at 865-866.]

The question of the construction of the word "encumbrance" appearing in the General Allotment Act of 1887, was recently before the Court of Claims in *Quinault Allottee Assoc. v. United States,* 485 F.2d 1391, 202 Ct. Cl. 625 (1973), *cert. denied,* 416 U.S. 961 (1974). The court held:

> . . . In 1887 Congress was speaking only in conventional terms of an encumbrance on the fee, such as would be represented by a lien or a mortgage. . . . [485 F.2d at 1396.]

The Court of Claims specifically rejected the argument that the term was ambiguous. 485 F.2d at 1400.

Conclusion.

For the reasons set forth in this brief, we respectfully urge the Court to grant the Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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